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Re: Donnelly's Mobile Home, Inc.
Case No. 04-60342 Chapter 11

LETTER DECISION AND ORDER

On August 26, 2004, the Court heard oral argument on the motions of Donnelly's Mobile Homes, Inc. ("Debtor"), asserting that Alliance Bank, N.A. ("Alliance") had violated the automatic stay provided for in § 362(a) of the Bankruptcy Code, and that Alliance should be restrained from seizing the Debtor's personal property under the terms of a Stipulation, dated April 28, 2004, which had been approved by the Court by Order, dated May 3, 2004. The Debtor sought reimposition of the automatic stay in this regard on the condition that it would provide adequate protection payments to Alliance. At the completion of the oral argument, the Court indicated that it would review the papers submitted by the parties and make a decision on the papers or determine that there was a need for an evidentiary hearing. In the interim, the Court indicated that the temporary restraining order, signed on August 19, 2004, which stayed Alliance from seizing any of the Debtor's property, would remain in effect pending a determination by the Court.

The Court has reviewed the papers filed by the parties and makes the following findings:

1. On May 3, 2004, the Court approved a Stipulation, dated April 28, 2004,¹ resolving Alliance's motion for an Order (1) directing the Debtor to cease and desist the unauthorized use of cash collateral; (2) directing the Debtor to account for and segregate cash collateral; and (3) terminating the automatic stay or, alternatively, converting the case to one under chapter 7.
2. Under the terms of the Stipulation, the Debtor agreed, *inter alia*, both to sell at least three mobile homes or "Units" per month between May and December 2004 and to pay Alliance on account of those sales. Alliance agreed that, subject to Court approval, the Debtor could satisfy the payment obligation by paying Alliance from advances made by Tammac "so long as the purchase price paid by the buyer of the Unit is paid directly to Tammac." *See* Paragraph III. E. of the Stipulation.
3. Under the terms of the Stipulation, the Debtor was deemed to be in default if (1) it failed to obtain a new cash collateral order or stipulation as to the use of cash collateral on or before July 23, 2004 or (2) it failed to sell the required number of Units and to pay Alliance the proceeds from the sales.
4. The Debtor remitted \$21,762 to Alliance by letter dated July 30, 2004, in connection with the sale of a Unit in July 2004.

¹ Alliance's counsel asserts that the Stipulation was the product of very active negotiations between the parties. Debtor's counsel does not dispute this allegation.

Similar Stipulations were entered into on April 28, 2004, by Alliance and Timothy J. Donnelly and Jacqueline A. Donnelly, individual debtors, and by Alliance and Donnelly's Communities Family Partnership, also a debtor. *See* Exhibits A, B and C, attached to Alliance's Opposition, filed August 23, 2004.

5. The Debtor also remitted payment of \$26,188 in July 2004 with respect to a Unit it allegedly sold in June 2004.

6. By letter, dated August 2, 2004, Alliance provided the Debtor with a Notice of Default based on the Debtor's failure to sell a minimum of three Units in July 2004 and to pay Alliance on account of the sale of at least three Units.

At the hearing on August 26, 2004, Debtor's counsel indicated that the Debtor was prepared to cure the default using financing from Tammac. However, Court approval for such financing had not been sought. Debtor's counsel also represented to the Court that Tammac was willing to pay off the monies owed to Alliance of approximately \$977,000 once Alliance had provided it with an accounting.²

Alliance's counsel argues that the Debtor is in default under the terms of the Stipulation as it failed to both sell three Units during July 2004 and remit payment to Alliance on the sale of three Units. Alliance's counsel also points out that the Debtor is in default by failing to obtain a new cash collateral order or stipulation as to the use of cash collateral on or before July 23, 2004.

At the telephone conference conducted on August 18, 2004, with respect to the Debtor's request for a temporary restraining order, the Court requested that the Debtor provide it with an affidavit to the effect that it had not only sold three Units in July 2004, but that it had also remitted the proceeds of such sales to Alliance. No such affidavit or any other proof of the required sales and payment has ever been filed with the Court. Most recently on August 31, 2004, Debtor's counsel

² According to Debtor's counsel, in a telephone conversation he had with Alliance's counsel on August 12, 2004, he was told that Alliance would accept payment in the amount of \$977,000 to cure the default. However, Alliance's counsel indicated that no such check was tendered to it by the end of that day. The Debtor did not dispute this and there is nothing in the record to indicate that any such check was ever presented to Alliance on behalf of the Debtor

provided the Court with a copy of correspondence, dated July 30, 2004, remitting \$21,762 to Alliance for a Unit sold by the Debtor in July 2004. *See* Letter from James C. Collins, dated August 31, 2004. However, nowhere in the letter does Debtor's counsel provide any additional proof that more than one Unit was sold by the Debtor in July 2004. While it has been represented to the Court that Tammac was prepared to provide financing for two mobile homes, there is no motion pending which seeks approval by the Court of such financing and no representation to the Court that there were actual buyers that purchased two such Units in July and are paying Tammac directly, as required under the terms of the Stipulation. There is no ambiguity in the language of the Stipulation in this regard. The Debtor's failure to sell three Units in July 2004 and to remit payment to Alliance in connection with any such sales and its failure to obtain a new cash collateral order constitute defaults under the terms of the Stipulation. The fact that the Debtor may now be in a position to satisfy its obligations to Alliance does not negate the fact of its default. Under these circumstances, the Court concludes that there is no need for an evidentiary hearing and that the temporary restraining order against Alliance is hereby vacated.

With respect to the Debtor's assertion that Alliance violated the automatic stay by having the Broome County Sheriff serve an Execution against Property on Timothy J. Donnelly, president of the Debtor, the documents presented to the Court by both the Debtor and Alliance make it clear that there was no violation of the automatic stay. The letters to the Broome County sheriff directed that he serve Timothy J. Donnelly, individually and as a partner in Donnelly's Communities Family Partnership, with the Executions against Property. *See* Exhibit G, attached to Alliance's Opposition, filed August 23, 2004. According to the affidavit of Timothy J. Donnelly, sworn to on August 25, 2004, he acknowledges that the levy execution, naming Donnelly's Communities Family Partnership

as Defendant-Judgment Debtor, was served on him on August 3, 2004. There is no evidence that he was served with any Execution against Property in his capacity as president of the Debtor. Accordingly, the Debtor's motion asserting a violation of the automatic stay in this regard must also be denied.

IT IS SO ORDERED.

Dated at Utica, New York

this 1st day of September 2004

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge